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Supreme Court, U.S.
FILED
071447 MAY 21 2008
OFFICE OF THE CLERK

No. 08-

IN THE

Supreme Court of the United States

ALEXANDER N. WILSON, PRIVATE,
UNITED STATES ARMY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari To the United States Court of Appeals for the Armed Forces

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Court of Appeals for the Armed Forces misconstrued Article 125, Uniform Code of Military Justice, 10 U.S.C. § 925, and relevant *Manual for Courts-Martial* provisions when it held that the defense of mistake of fact does not apply to the age element of sodomy with a child?

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IN THE
SUPREME COURT OF THE UNITED STATES

ALEXANDER N. WILSON, PRIVATE,
UNITED STATES ARMY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari To the United States Court of Appeals for the Armed Forces

PETITION FOR WRIT OF CERTIORARI

The petitioner, Alexander N. Wilson, respectfully prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Armed Forces in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Armed Forces is reported at 66 M.J. 39 (C.A.A.F. 2008) (Appendix A). The decision of the United States Army Court of Criminal Appeals is unreported (Appendix B).

JURISDICTION

The judgment for the United States Court of Appeals for the Armed Forces (CAAF) was entered on February 25, 2008. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1259(3), the CAAF having reviewed this case pursuant to Article 67(a)(3), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 867(a)(3).

STATUTE INVOLVED

Article 125, UCMJ, 10 U.S.C. § 925 provides:

> § 925. Art. 125. Sodomy
> (a) Any person subject to this chapter who engages in unnatural carnal copulation with another person of the same or opposite sex or with an animal is guilty of sodomy. Penetration, however slight, is sufficient to complete the offense.
> (b) Any person found guilty of sodomy shall be punished as a court-martial may direct.

RULE FOR COURTS-MARTIAL INVOLVED

Rule for Courts-Martial (R.C.M.) 916(j)(1) provides:

> (j) *Ignorance or mistake of fact.*
> (1) *Generally.* Except as otherwise provided in this subsection, it is a defense to an offense that the accused held, as a result

of ignorance or mistake, an incorrect belief of the true circumstances such that, if the circumstances were as the accused believed them, the accused would not be guilty of the offense. If the ignorance or mistake goes to an element requiring premeditation, specific intent, willfulness, or knowledge of a particular fact, the ignorance or mistake need only have existed in the mind of the accused. If the ignorance or mistake goes to any other element requiring only general intent or knowledge, the ignorance or mistake must have existed in the mind of the accused and must have been reasonable under all the circumstances. However, if the accused's knowledge or intent is immaterial as to an element, then ignorance or mistake is not a defense.

. . . .

MANUAL FOR COURTS-MARTIAL PROVISION INVOLVED

Manual for Courts-Martial, United States (*MCM*), pt. IV, para. 51 (2002 ed.), in relevant part, provides:

b. *Elements.*

(1) That the accused engaged in unnatural carnal copulation with a certain other person or with an animal.

(Note: Add either or both of the following elements if applicable)

(2) That the act was done with a child under the age of 16.

(3) That the act was done by force and without the consent of the other person.

. . .

d. *Lesser included offenses.*

(1) *With a child under the age of 16.*

. . .

(b) Article 134—indecent acts with a child under 16

. . .

e. *Maximum punishment.*

(1) *By force and without consent.* Dishonorable discharge, forfeiture of all pay and allowances, confinement for life without the eligibility for parole.

(2) *With a child who, at the time of the offense, has attained the age of 12 but is under the age of 16 years.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 20 years.

(3) *With a child under the age of 12 years at the time of the offense.* Dishonorable discharge, forfeiture of all pay allowances, and confinement for life without the eligibility for parole.

(4) *Other cases.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.

. . . .

STATEMENT

Before a military judge sitting as a special court-martial, petitioner pleaded guilty to failure to repair, disobeying a superior commissioned officer, carnal knowledge, and sodomy with a child under the age of sixteen in violation of Articles 86, 90, 120, and 125, UCMJ, 10 U.S.C. §§ 886, 890, 920, and 925 (2000). The convening authority approved the adjudged sentence of reduction to Private (E-1), confinement for eighty days, and a bad-conduct discharge. The Army Court of Criminal Appeals summarily affirmed the findings and sentence. On discretionary review, and in a 3-2 decision, the CAAF affirmed.

The charged Article 125, UCMJ, offense alleged that petitioner did "on divers occasions . . . commit sodomy with [TS], a child under the age of 16 years." During petitioner's guilty plea, the providence inquiry and stipulation of fact revealed that in September and October 2003, petitioner engaged in sexual intercourse and sodomy on numerous occasions with TS. When they first met, TS told petitioner she was eighteen years old. In fact, TS was only fifteen years old. Though the record presents conflicting evidence as to when petitioner learned of TS's true age, sufficient evidence exists to support a finding that petitioner honestly and reasonably believed TS was over sixteen years of age when he engaged with her in the acts of sodomy for which he was found guilty. At trial, however, the military judge informed petitioner that, "it's also no defense if you were ignorant or misinformed as to

[TS]'s true age. It's the fact of her age not your knowledge or belief that affixes criminal responsibility." Petitioner appealed, asserting that mistake of fact as to age is a valid defense to sodomy with a child under the age of sixteen. The Army Court of Criminal Appeals summarily affirmed the findings and sentence in a per curiam, unpublished opinion.

On further appeal, the CAAF also affirmed, but in a 3-2 decision. The majority explained that "the analysis as to whether a mistake of fact defense is available turns on the question whether a mistake with respect to the fact in question negates a required mental state essential to the crime charged." Undertaking the matter of statutory construction to resolve that question, the majority first noted that the text of Article 125, UCMJ, does not address the age of the child for the aggravated offense of sodomy with a child. It then turned to the elements of the aggravated offense of sodomy with a child created by the President—one of those elements being the age of the child. In conducting a mens rea analysis of the age element, the court first noted it does not contain an explicit mens rea. In its discussion of whether to imply a mens rea to the age element, the court noted the common law presumption in favor of mens rea. However, relying on the practice in other jurisdictions and dicta from this Court indicating that age in child sex offenses falls outside the presumption, the court refused to imply a mens rea using the common law presumption.

The CAAF also rejected petitioner's argument that, in light of similar sexual offenses with children, where the mistake of fact defense indisputably applies, the court should hold that, by reference, the defense applies to sodomy with a child. The court noted that similar statutes dealing with sex offenses, such as Article 120, UCMJ, and 18 U.S.C. § 2243, contain explicit mistake of fact defenses and that any attempt to harmonize the scheme criminalizing sexual contact with children involves a policymaking decision appropriately undertaken by Congress or the President.[1]

Chief Judge Effron dissented. He began by noting the disparate treatment of closely related sexual offenses the majority's holding will produce. He went on to note that the "disparity . . . is not required by either the statutory or regulatory text that describes the pertinent offenses." Like the majority, he noted that Article 125, UCMJ, does not contain an explicit mistake of fact defense, but unlike the majority, he would have held that R.C.M. 916(j)(1), the general mistake of fact defense in the *MCM*, does apply to sodomy with a child, just like the court held it applied to indecent acts with a child in *United States v. Zachary*, 63 M.J. 438 (C.A.A.F. 2006). Chief Judge Effron explained, "[T]he offense of sodomy is like any other offense under the UCMJ in which the mistake of fact

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[1] Curiously, the court did not address Article 134, UCMJ, 10 U.S.C. § 934 (Indecent acts with a child), which, like Article 125, UCMJ, does not contain an explicit mistake of fact defense, but to which the defense does apply, as the court held in *United States v. Zachary*, 63 M.J. 438 (C.A.A.F. 2006).

defense has not been regulated by Congress or the President. A military judge must decide at trial whether the defense is applicable, and an appellate court must decide whether the military judge ruled correctly on the issue." Unlike the majority, he believed that, absent any express restriction or guidance from Congress or the President, the responsibility for determining whether mistake of fact applies to sodomy with a child rests with the judiciary, not a policymaker.

Judge Baker also dissented. His disagreement with the majority centered on his belief it misapplied the common law presumption in favor of mens rea. First, Judge Baker noted that age is, indeed, an element of the aggravated offense of sodomy with a child. Second, he noted the ambiguity in the elements as to whether the age of the child merely reflected a fact, to which the defense may not apply, or part of the act of sodomy, to which the question of intent (and the defense) would apply. It is this ambiguity, Judge Baker noted, that puts the issue squarely in the crosshairs for judicial interpretation. Applying the same principles of statutory construction cited by the majority, Judge Baker would have found both readings of the elements available, applied the rule of lenity, and resolved the ambiguity in favor of petitioner.

REASONS FOR GRANTING THE PETITION

The United States has seen a disturbing increase in the number of sex offenses involving children.

Unfortunately, the military has not been immune from this trend. To combat this insidious problem, the military employs a number of important federal statutes criminalizing sexual contact with children. However, to avoid punishing Soldiers with no vicious intent, the military allows accused Soldiers to raise a mistake of fact as to age defense to certain sex crimes with children where the accused reasonably and honestly believed the individual was at least sixteen years old. In this case, the lower court decided that the mistake of fact defense does not apply to sodomy with a child, despite its similar nature and structure to other military sex offenses where the defense does apply. This Court needs to settle this important federal question in the military because the lower court misapplied the common law rule presuming mens rea for the elements of a crime and created a rule that will yield inconsistent results amongst similarly situated offenses and offenders.

SUMMARY OF ARGUMENT

The defense of mistake of fact as to age applies to sodomy with a child under the age of sixteen because the age of the child is a general intent element of the offense. Normally, every element of an offense has a mental component. Absent an affirmative indication that Congress or the President intended to dispense with mens rea, there is a presumption against strict liability in criminal offenses. Nothing indicates the President intended sodomy with a child to serve as a strict liability offense. As neither intent nor specific knowledge is

mentioned, the applicable mens rea of the age element is general intent. An honest and reasonable mistake of fact constitutes a defense to a general intent element; therefore, the defense of mistake of fact as to age is available to an accused charged with sodomy with a child under the age of sixteen.

ARGUMENT

The crime of sodomy has its roots in common law. *See Lawrence v. Texas*, 539 U.S. 558, 568-74 (2003) (discussing history of sodomy laws); *United States v. Harris*, 8 M.J. 52 (C.M.A. 1979) (discussing common law sodomy). Congress has criminalized sodomy in the military by way of Article 125, UCMJ, which provides,

> (a) Any person subject to this chapter who engages in unnatural carnal copulation with another person of the same or opposite sex or with an animal is guilty of sodomy. Penetration, however slight, is sufficient to complete the offense.
> (b) Any person found guilty of sodomy shall be punished as a court-martial may direct.

As its plain text shows, Article 125, UCMJ, criminalizes sodomy without regard to the age of the victim.

However, the President, through executive order, has created a distinct category of sodomy involving a

child. *MCM*, pt. IV, para. 51b (2002 ed.). Paragraph 51b, entitled "Elements," provides,

> (1) That the accused engaged in unnatural carnal copulation with a certain other person or with an animal.
> (Note: Add either or both of the following *elements* if applicable)
> (2) *That the act was done with a child under the age of 16.*
> (3) That the act was done by force and without the consent of the other person.

Id. (emphasis added).[2] The President promulgated these additional elements under his authority to prescribe punishments for offenses. *See* Article 56, UCMJ, 10 U.S.C. § 856 ("The punishment which a court-martial may direct for an offense may not exceed such limits as the President may prescribe

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[2] These were the elements of sodomy in effect at the time of petitioner's offenses. The President has since amended paragraph 51b to provide for two distinct categories of sodomy involving a child. The elements now include the following:

> (1) That the accused engaged in unnatural carnal copulation with a certain other person or with an animal.
> (Note: Add any of the following as applicable)
> (2) That the act was done with a child under the age of 12.
> (3) That the act was done with a child who had attained the age of 12 but was under the age of 16.
> (4) That the act was done by force and without the consent of the other person.

MCM, pt. IV, para. 51b (2005 ed.).

for that offense."). These age and consent elements serve as aggravating factors, or sentence enhancers, that increase the maximum punishment. Sodomy with a child who has attained the age of twelve but not sixteen permits confinement for twenty years. *MCM*, pt. IV, para. 51e (2002 ed.). Sodomy with a child under twelve permits confinement for life without the eligibility for parole, as does forcible sodomy. *Id.*

Rule for Courts-Martial 916(j)(1), which encapsulates the defense of mistake of fact as it exists in military law, divides elements into three categories, depending on the mens rea required: (1) specific intent elements, which require "premeditation, specific intent, willfulness, or knowledge of a particular fact;" (2) general intent elements, which require "only general intent or knowledge;" and (3) strict liability elements, where "knowledge or intent is immaterial." To constitute a defense to a specific intent element, a mistake of fact need only be honest, while a mistake as to a general intent element must be both honest and reasonable. R.C.M. 916(j)(1). Because strict liability elements do not contain a mens rea component, a mistaken belief as to facts within those elements is not a defense. *Id.*

The question of whether knowledge or intent is material to an element is an issue of statutory construction. *Staples v. United States*, 511 U.S. 600, 604 (1994). A fundamental principle regarding this issue is that strict liability offenses, requiring no mens rea for at least one element, have a "generally

disfavored status." *Liparota v. United States*, 471 U.S. 419, 426 (1985). The common-law rule, which has also been applied to statutory offenses, requires some mens rea for a crime. *Staples*, 511 U.S. at 605-06. "Silence . . . by itself does not necessarily suggest that Congress intended to dispense with a conventional mens rea element, which would require that the defendant know the facts that make his conduct illegal." *Id.* at 605; *see United States v. Langley*, 33 M.J. 278, 281 (C.M.A. 1991) (stating that since no specific intent is mentioned in Article 120, UCMJ, general intent applies). This Court has suggested that there must be some indication of congressional intent to create a strict liability crime. *Staples*, 511 U.S. at 606.

Here, the essential question is whether the President intended to dispense with a conventional mens rea element when he created the aggravated sodomy offense of sodomy with a child. Though the element itself is silent on this issue, nothing affirmatively indicates the President intended sodomy with a child to be a strict liability offense with no requirement that an accused know that he is engaging in sexual activity with a child. Thus, as *Staples* instructs, the age element must be interpreted as containing a traditional mens rea component. Because the element does not mention intent or specific knowledge, the applicable mens rea is general intent, to which an honest and reasonable mistake of fact defense applies.

The fact that the age element itself does not mention a mental component does not mean that

knowledge or intent is immaterial. Indeed, the lower court has applied the mistake of fact defense to many general intent crimes in the military where there is no affirmative indication that the element at issue requires knowledge or intent. *See, e.g., United States v. Hibbard*, 58 M.J. 71, 72 (C.A.A.F. 2003) (applying mistake of fact to rape); *United States v. Brown*, 22 M.J. 448, 451 (C.M.A. 1986) (applying mistake of fact to violation of a general regulation); *United States v. Timmins*, 45 C.M.R. 249 (C.M.A. 1972) (applying mistake of fact to AWOL). Moreover, when the President or Congress intends to dispense with mens rea and impose strict liability, they say as much. In Part IV of the *MCM*, the President's explanation of the offense of improper use of a countersign explicitly addresses the relevance of an accused's knowledge of the essential facts. *MCM*, pt. IV, para. 25c(4) (2002 ed.) (stating that "the accused's intent or motive in disclosing the countersign or parole is immaterial to the issue of guilt, as is the fact that the disclosure was negligent or inadvertent" and that "it is no defense that the accused did not know that the person to whom the countersign or parole was given was not entitled to receive it"). In Article 120, UCMJ, Congress has defined when mistake of fact constitutes a defense to carnal knowledge and has specifically excepted cases where the victim is under the age of twelve. The discussion section to R.C.M. 916(j) also notes these two offenses as "[e]xamples of offenses in which the accused's intent or knowledge is immaterial" and the defense of mistake of fact does not apply.

In the second part of its statutory and regulatory analysis, the lower court notes that Congress's amending Article 120, UCMJ, in 1996 to include a mistake of fact defense for carnal knowledge cases, followed in the same year by the President's implementing the change in the *MCM*, militates against finding that Congress and the President ever intended to have the same defense apply to sodomy with a child. When one considers the state of the *MCM* before those changes, however, it becomes apparent that Congress's and the President's actions in 1996 stand for the proposition that mistake of fact has applied to sodomy with a child all along.

For the offense of carnal knowledge, the 1995 *MCM* provides, "It is no defense that the accused is ignorant or misinformed as to the true age of the female . . .; it is the fact of the girl's age and not his knowledge or belief which fixes his criminal responsibility." *MCM*, pt. IV, para. 45c(2) (1995 ed.). For the offense of sodomy with a child, the 1995 *MCM* provides no similar language. *Id.* at para. 51c. As the lower court recognized in its opinion, this Court has consistently held that "'[Where] Congress includes particular language in one section of a statute but omits it in another section . . . it is generally presumed that Congress acts intentionally and purposely in the disparate . . . exclusion.'"[3] *Russello v. United States*, 464 U.S. 16,

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[3] The lower court uses the rules of statutory interpretation to construe the *MCM*. *United States v. Custis*, 65 M.J. 366, 370 (C.A.A.F. 2007).

23 (1983) (citation omitted). It follows that when the President used strict liability language to describe carnal knowledge but did not use such language to describe sodomy with a child, then the latter is not a strict liability offense. Moreover, the use of such language suggests that, pre-1996, carnal knowledge was an offense for purposes of R.C.M. 916(j) where "knowledge or intent is immaterial" while the absence of such language to describe sodomy with a child suggests that offense falls within the general mistake of fact defense for general intent crimes provided in R.C.M. 916(j).

What makes the lower court's statutory and regulatory analysis all the more surprising is that the court reached the opposite conclusion just two years ago when it decided the same issue in a case involving a similar sexual offense. In *United States v. Zachary*, 63 M.J. 438 (C.A.A.F. 2006), the lower court held that an honest and reasonable mistake of fact defense is available to an accused charged with committing indecent acts with a child under the age of sixteen. *Id.* at 439. Recognizing the incongruity that would result if mistake of fact did not apply to all similarly criminalized sexual activity with children, the court indicated that mistake of fact also applies to sodomy with a child.[4] *Id.* at 442.

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[4] Citing the 1996 change to Article 120(b), UCMJ, which recognized a mistake of fact defense for carnal knowledge, the lower court noted, "The practical effect of this amendment is that mistake of fact as to age is now a clearly delineated defense for the crimes of sodomy and carnal knowledge." *Zachary*, 63 M.J. at 442. Perhaps one reason for this language is the lower court's longstanding recognition that rape and

Moreover, the court noted indecent acts with a child is a lesser included offense of sodomy with a child, implying that it would not be permissible for the mistake of fact defense to apply to the lesser offense but not the greater where both offenses share the same element. *Id.* at 442 n.27.

The lower court's shunning of *Zachary* is particularly perplexing given the similar structure of the offense at issue in that case to the offense at issue in this case. *Compare MCM*, pt. IV, para. 87 (2002 ed.), *with id.* at para. 51. In both offenses, age is an element. The *MCM*, not the statutes involved, sets forth the age element for both offenses. In *Zachary*, the lower court held that the general mistake of fact defense in R.C.M. 916(j)(1) applies to the age element of indecent acts with a child. Yet, here, the lower court, faced with a similar offense involving sexual contact with children, held that the same defense does not apply. The lower court's analysis in *Zachary* offered persuasive guidance to the lower court on this issue, yet it failed to even address the merits of that case, much less distinguish it.

As a result, sodomy with a child represents an outlier in the scheme of sex crimes in the military.

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sodomy are treated the same in many respects. *See United States v. Goodman*, 33 C.M.R. 195, 198 (C.M.A. 1963) ("'It has been said that sodomy and rape are 'kindred crimes' and that the principles of law governing the one also govern the other.'") (citations omitted); *United States v. Morgan*, 24 C.M.R. 151, 153 (C.M.A. 1957) (recognizing the same).

Rather than engage in judicial interpretation of a substantive issue of criminal law, the lower court abdicated its interpretive role to Congress or the President, lamenting that the issue involved a public policy decision. In so doing, the court created a rule that will result in disparate treatment of similar sex crimes, several of which are often implicated in the same course of conduct. Under the lower court's ruling, a Soldier who engages in sexual intercourse, inappropriate touching, and oral sodomy in the same course of conduct with a child under sixteen, yet one who he honestly and reasonably believed to be over sixteen, will have a viable defense to the first two offenses, but not the third. Disparity will result amongst various offenders as well—for instance, when one Soldier engages in sexual intercourse and another Soldier engages in oral sodomy with underage individuals, the former has a potential mistake of fact defense, while the latter does not. Because a proper statutory and regulatory analysis does not dictate these incongruent results, this Court should exercise its discretion and grant the petition.

CONCLUSION

WHEREFORE, petitioner respectfully requests that this Court grant his petition.

Respectfully submitted,

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APPENDIX A

UNITED STATES, Appellee

v.

Alexander N. WILSON, Private U.S. Army, Appellant

No. 06-0870
Crim. App. No. 20040227

UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

Argued April 30, 2007, and October 17, 2007
Decided February 25, 2008

RYAN, J., delivered the opinion of the Court, in which ERDMANN and STUCKY, JJ., joined. EFFRON, C.J., and BAKER, J., each filed a separate dissenting opinion.

Military Judge: Debra Boudreau.

Judge RYAN delivered the opinion of the Court.

A special court-martial, composed of a military judge alone, convicted Appellant, pursuant to his pleas, of failing to go to an appointed place of duty,

disobeying a commissioned officer, carnal knowledge, and sodomy with a child under sixteen, in violation of Articles 86, 90, 120, and 125, Uniform Code of Military Justice (UCMJ), 10 U.S.C. §§ 886, 890, 920, 925 (2000). The sentence adjudged by the special court-martial and approved by the convening authority included a bad-conduct discharge, reduction to the lowest enlisted grade, and confinement for eighty days. The United States Army Court of Criminal Appeals summarily affirmed the findings and sentence. *United States v. Wilson*, No. ARMY 20040227 (A. Ct. Crim. App. May 15, 2006) (unpublished).

On Appellant's petition, we granted review of the following issue:

> WHETHER THE ARMY COURT ERRED BY AFFIRMING THE FINDINGS AND SENTENCE WHERE THE MILITARY JUDGE, IN ACCEPTING APPELLANT'S GUILTY PLEA TO SODOMY WITH A CHILD UNDER 16, INSTRUCTED APPELLANT THAT HIS HONEST AND REASONABLE MISTAKE OF FACT DID NOT CONSTITUTE A DEFENSE. [1]

After hearing argument, this Court specified the following issue for a second round of briefing and argument and invited all government and defense appellate divisions to file briefs as amici curiae:

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[1] 64 M.J. 438 (C.A.A.F. 2007).

IS THE DEFENSE OF MISTAKE OF FACT AS TO AGE AVAILABLE WITH RESPECT TO A CHARGE OF SODOMY WITH A CHILD UNDER THE AGE OF 16, ARTICLE 125, 10 U.S.C. § 825 [sic]?[2]

The military judge determined at trial that there was no such defense. The Army Court of Criminal Appeals agreed in a summary disposition. We agree. There is no mistake of fact defense available with regard to the child's age in the Article 125, UCMJ, offense of sodomy with a child under the age of sixteen.

Background

The facts, as they pertain to the granted and specified issues, need only be briefly recounted. The providence inquiry and stipulation of facts show that on or about September 13, 2003, through October 20, 2003, Appellant had sexual intercourse and engaged in sodomy at least once a day with TS. TS was, in fact, fifteen years old during this time. But TS told Appellant at their first meeting on September 13, 2003, that she was eighteen years old. The record presents conflicting evidence as to whether or when Appellant discovered TS's actual age.

The charged Article 125, UCMJ, offense alleged that Appellant did "on divers occasions . . . commit sodomy with [TS], a child under the age of 16 years."

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[2] 65 M.J. 254 (C.A.A.F. 2007).

At trial, the military judge informed Appellant that, "it's also no defense if you were ignorant or misinformed as to [TS]'s true age. It's the fact of her age not your knowledge or belief that affixes criminal responsibility." Appellant asserts that the military judge's statement on this point was incorrect, and argues that based on this incorrect statement of the law his plea should be set aside.

Analysis

Generally, the analysis as to whether a mistake of fact defense is available turns on the question whether a mistake with respect to the fact in question negates a required mental state essential to the crime charged. Wayne R. LeFave, *Substantive Criminal Law* § 5.6 (2d ed. 2003). The answer to that question, in turn, is a matter of statutory construction, and, when necessary, an "'inference of the intent of Congress.'" *Staples v. United States,* 511 U.S. 600, 605, 114 S. Ct. 1793, 128 L. Ed. 2d 608 (1994) (quoting *United States v. Balint,* 258 U.S. 250, 253, 42 S. Ct. 301, 66 L. Ed. 604, T.D. 3375 (1922)). The statute may specifically list a mens rea for a fact, and the mens rea may differ for different facts that constitute the crime. *See Carter v. United States,* 530 U.S. 255, 268-69, 120 S. Ct. 2159, 147 L. Ed. 2d 203 (2000); *Liparota v. United States,* 471 U.S. 419, 423 n.5, 105 S. Ct. 2084, 85 L. Ed. 2d 434 (1985).

Even where the statute, by its terms, does not provide a mens rea with respect to a particular fact, courts may read in an intent in order to effectuate

"the background rule of the common law favoring *mens rea*." *Staples,* 511 U.S. at 619 n.17. Under either of these two scenarios, Rule for Courts-Martial (R.C.M.) 916(j)(1) allows a mistake of fact defense.

Nor do we question that even where the statute does not require mens rea with respect to a particular fact, whether expressly or impliedly, the legislature or the executive may, as a matter of policy, explicitly add a mistake of fact defense. *See* Article 120, UCMJ; R.C.M. 916(j)(2) (providing a mistake of fact as to age defense when the sexual conduct involves a person at least twelve, but less than sixteen, years old).[3] In other words, even though the government need not prove any mens rea with respect to a particular fact essential to the crime charged, a mistake of fact defense may be created by the appropriate policymaker.

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[3] We note that Article 120, UCMJ, and the R.C.M. 916(j) elucidation of the Article 120, UCMJ, mistake of fact defense, as applicable at the time of Appellant's case, have since been amended. *See* National Defense Authorization Act (NDAA) for Fiscal Year 2006, Pub. L. No. 109-163, § 552, 119 Stat. 3136, 3257-63 (West) (to be codified as amended at 10 U.S.C. § 920); Exec. Order No. 13,447, 72 Fed. Reg. 56,179 (Oct. 2, 2007). These changes do not affect our analysis in this case as both the 2000 and 2006 version of Article 120, UCMJ, contain a mistake of fact defense as to the age of a child when the criminality of the conduct in question turns on the child being older than twelve and younger than sixteen. *See* Article 120(d), UCMJ, 10 U.S.C. §920 (2000); Article 120(o), UCMJ, 2006 NDAA§552,119Stat.at3258-59.

The charge and specification in this case setting forth the violation of Article 125, UCMJ, required the Government to allege and prove that Appellant: (1) engaged in sodomy with TS, and (2) that TS was under the age of sixteen. *See Manual for Courts-Martial, United States* pt. IV, para. 51.e. (2005 ed.) (*MCM*) (listing facts that increase the maximum punishment); R.C.M. 307(c)(3) (stating that such facts need to be alleged). While the conduct charged under Article 125, UCMJ, in this case remains criminal, an act of sodomy in private between consenting adults may not be, absent some other fact. *See Lawrence v. Texas,* 539 U.S. 558, 578, 123 S. Ct. 2472, 156 L. Ed. 2d 508 (2003) (reasoning that the constitutionally protected sodomy did "not involve minors"); *United States v. Marcum,* 60 M.J. 198, 203-08 (C.A.A.F. 2004) (noting *Lawrence's* exceptions for cases involving minors, or persons "'who might be injured or coerced or who are situated in relationships where consent might not easily be refused'" in upholding Article 125, UCMJ, as applied in a case of sodomy within the chain of command) (citation omitted).

It is because the criminal nature of the conduct in this case may depend upon the fact of age that we undertake the mens rea analysis with respect to that fact, and not because we otherwise hold that mens rea must exist for every fact that results in increased punishment in every offense. Thus, the question is whether there is mens rea with respect to the fact that TS was under sixteen: whether Appellant had to know that she was under sixteen. If not, the only remaining question is whether this

Court should nonetheless provide a mistake of fact defense with respect to age, even where Appellant's knowledge of that fact is irrelevant, and even where the appropriate policymakers have declined to do so.

I.

Given the language of Article 125, UCMJ, and the *MCM*, the manner in which almost every other criminal jurisdiction in the United States deals with the issue of knowledge with respect to age in sexual offenses involving children, and the studied inaction with respect to such a defense to sodomy with a child by Congress and the President, we decline to find or imply a mistake of fact defense with respect to the age of the child under Article 125, UCMJ.[4]

A.

The mens rea with respect to a fact essential to a charged offense is a "question of statutory construction." *Staples*, 511 U.S. at 604. We begin with the text of the statute in question. *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 254, 112 S. Ct.

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[4] Both parties cite this Court's opinion in *United States v. Zachary*, 63 M.J. 438 (C.A.A.F. 2006), to support the position that a mistake of fact defense exists with respect to the age of the child for the offense of sodomy with a child under sixteen. In dicta, *Zachary* opined that such a defense would be available. *Id.* at 442. However, *Zachary* was not a case involving an Article 125, UCMJ, sodomy charge. With that issue now presented squarely to this Court, we hold otherwise.

1146, 117 L. Ed. 2d 391 (1992). Article 125, UCMJ, states:

> (a) Any person subject to this chapter who engages in unnatural carnal copulation with another person of the same or opposite sex or with an animal is guilty of sodomy. Penetration, however slight, is sufficient to complete the offense.
>
> (b) Any person found guilty of sodomy shall be punished as a court-martial may direct.

The text of Article 125, UCMJ, simply does not specifically address the age of the child for the aggravated offense of sodomy with a child, let alone include an explicit intent or knowledge requirement for that offense.

But the description of the offense in Article 125, UCMJ, does not end our textual analysis. Pursuant to Article 36, UCMJ, 10 U.S.C. § 836 (2000), and Article 56, UCMJ, 10 U.S.C. § 856 (2000), the President may set different maximum authorized punishments for an offense based on specific facts. *See Loving v. United States*, 517 U.S. 748, 769-70, 116 S. Ct. 1737, 135 L. Ed. 2d 36 (1996) (recognizing that Congress has delegated to the President the authority to address modes of proof and punishment that a court-martial may direct); *United States v. Kelson*, 3 M.J. 139, 140-41 (C.M.A. 1977) (stating that the President's authority under Article 36, UCMJ, "is limited only by the requirement that the rules be consistent with the Constitution or other

laws") (citations omitted). In the case of Article 125, UCMJ, the President added, *inter alia,* a factor that may be pled and proven to increase the punishment -- the age of the child.[5] *MCM* pt. IV, para. 51.b., 51.e.

As noted *supra* at pp. 6-7, we undertake a mens rea analysis with respect to the fact of age in this case, because it is that fact that likely makes the charged conduct criminal in this case. But the President's addition of the fact of the age of the child also does not contain an explicit mens rea. *See MCM* pt. IV, para. 51.b., 51.e. (requiring that the act was done with a child who had attained the age of twelve, but was under the age of sixteen).

B.

The want of an explicit mens rea with respect to the age of the child does not end the inquiry. Even in the absence of an express intent in the text, we construe the crime charged in light of "background rules of the common law." *Staples,* 511 U.S. at 605 (citing *United States v. United States Gypsum Co.,* 438 U.S. 422, 436-37, 98 S. Ct. 2864, 57 L. Ed. 2d 854 (1978)). A bedrock precept and assumption of the criminal law is that "an injury can amount to a crime only when inflicted by intention." *Morissette v. United States,* 342 U.S. 246, 250, 72 S. Ct. 240, 96 L. Ed. 288 (1952). In construing the UCMJ and the

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[5] In this case, Appellant was charged with, and pled guilty to, the factor added by the President in the *MCM* and there is no question that R.C.M. 307(c)(3) was complied with.

MCM, therefore, the assumption is that there is no wish, as a general rule, to punish otherwise lawful conduct absent a vicious will. *See Staples,* 511 U.S. at 606 ("Relying on the strength of the traditional rule, we have stated that offenses that require no *mens rea* generally are disfavored, and have suggested that some indication of congressional intent, express or implied, is required to dispense with *mens rea* as an element of a crime.") (citations omitted).

Statutes such as Articles 120 and 125, UCMJ, criminalize sexual conduct that, but for some factor such as the age of the accused's partner, may otherwise be lawful. Therefore, it initially appears as if this Court would be within its charter to imply a mens rea with respect to age under either article and to determine that Congress and the President intended not simply that the child be under a certain age, but also that a defendant knew or reasonably should have known that fact. For if a mens rea existed with respect to the fact of age, a mistake of fact defense would inexorably follow. *See* R.C.M. 916(j)(1).

C.

But the Supreme Court has noted exceptions to the common law assumption otherwise auguring in favor of mens rea. Most often, the Supreme Court has determined that when the offense is deemed to be one directed at protecting the "public welfare" no mens rea is required. *See United States v. Freed,* 401 U.S. 601, 607, 91 S. Ct. 1112, 28 L. Ed. 2d 356

(1971); *United States v. Dotterweich*, 320 U.S. 277, 281, 64 S. Ct. 134, 88 L. Ed. 48 (1943); *United States v. Behrman*, 258 U.S. 280, 287, 42 S. Ct. 303, 66 L. Ed. 619, T.D. 3376 (1922); *United States v. Balint*, 258 U.S. 250, 253, 42 S. Ct. 301, 66 L. Ed. 604, T.D. 3375 (1922). In the context of discussing why "public welfare offenses" do not require a mens rea, the Supreme Court has noted another, separate common law exception to the mens rea requirement -- the age of the child in sexual offenses involving children.[6] *See Morissette*, 342 U.S. at 251 n.8 ("Exceptions [to a mens rea requirement] came to include sex offenses, such as rape, in which the victim's actual age was determinative despite defendant's reasonable belief that the girl had reached age of consent."); *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 72 n.2, 115 S. Ct. 464, 130 L. Ed. 2d 372 (1994) (reiterating distinction described in *Morissette*); *see also United States v. Wilcox*, 487 F.3d 1163, 1174 (8th Cir. 2007) (recognizing the same and noting that federal courts have uniformly rejected the argument that there is a constitutional right to the defense that the defendant made a reasonable mistake as to the

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[6] In our view it is incorrect to characterize sex offenses involving children as "public welfare" offenses per se. An Article 125, UCMJ, sodomy offense is not a "public welfare" offense. Such offenses typically serve a regulatory function, have relatively minor penalties, and almost never involve imprisonment. *See Staples*, 511 U.S. at 616-18; *Balint*, 258 U.S. at 251-53. Article 125, UCMJ, is not regulatory in nature, and the maximum authorized punishment includes twenty years imprisonment. *See* Francis Bowes Sayre, *Public Welfare Offenses*, 33 Colum. L. Rev. 55, 72-74 (1933).

child's age); *see also* Catherine L. Carpenter, *On Statutory Rape, Strict Liability, and the Public Welfare Offense Model*, 53 Am. U. L. Rev. 313 (2003) (cataloging and criticizing jurisdictions that allow an absence of mens rea with respect to the child's age, thus making a mistake of fact defense unavailable); Sayre, *supra* note 6, at 72-74 (recognizing that a mistake of fact defense is not available with respect to the age of the child in sex offenses that are dependent on the child being below a specified age, even though the offenses are not public welfare offenses).

Of course, the Supreme Court, while opining in dicta that the historic practice is that the age of the child falls outside the normal mode of analysis and is akin to the public welfare model, has never so held. And it may well be, as some argue, *see, e.g., People v. Hernandez*, 61 Cal. 2d 529, 39 Cal. Rptr. 361, 393 P.2d 673 (Cal. 1964); Carpenter, *supra*, at 313, that the absence of a mens rea with respect to age in child sex offenses is an anachronism, and that sexual activities with children should be treated like any other crime. But the convention recognized by the Supreme Court is mirrored by the actual treatment of mens rea with respect to the age of the child in sexual offenses involving children in other jurisdictions, and the different treatment of the same between Articles 120 and 125, UCMJ. Convinced that creation of such a defense under Article 125, UCMJ, is a decision for policymakers, and not this Court, we decline to read a mens rea with respect to the age of the child into Article 125, UCMJ.

D.

This view is supported by the practice in other jurisdictions. Absent the affirmative creation of either an actual mens rea requirement with respect to the age of the child or a mistake of fact defense even where proof of mens rea is not otherwise required by the appropriate policy-making body, an age-based mistake of fact defense has been found by only four courts. *Hernandez*, 393 P.2d at 673; *Perez v. State*, 111 N.M. 160, 803 P.2d 249 (N.M. 1990); *State v. Elton*, 680 P.2d 727 (Utah 1984); *State V. Guest*, 583 P.2d 836 (Alaska 1978). But *Perez*, *Elton*, and *Guest* have been superseded by statute, leaving California as the only jurisdiction currently operating under a judicially created mistake of fact defense. *See* Alaska Stat. § 11.41.445(b) (2007); N.M. Stat. Ann. § 30-9-11 (West 2007); Utah Code Ann. § 76-2-304.5 (2007).

Twenty-two states have no provision in their statutory framework for a mistake of fact defense when the sexual activity involves children: there is neither a mens rea with respect to age nor an explicit defense. All but one of those states' courts have declined to recognize a mistake of fact defense with respect to the age of the child.[7]

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[7] *Miller v. State*, 16 Ala. App. 534, 79 So. 314, 315 (Ala. Ct. App. 1918); *see also* Ala. Code § 13A-6-62 (2007) (commentary); *State v. Blake*, 63 Conn. App. 536, 777 A.2d 709, 713 (Conn. App. Ct. 2001); *Pritchard v. State*, 2004 Del. LEXIS 61, at *4, 2004 WL 249419, at *1-*2 (Del. Feb. 4, 2004); *Haywood v. State*, 283 Ga. App. 568, 642 S.E.2d 203, 204 (Ga. Ct. App. 2007); *State v. Buch*, 83 Haw. 308, 926 P.2d 599, 607

In a very few states, a mens rea is explicitly required with respect to the age of the child. *See, e.g.*, Ohio Rev. Code Ann. § 2907.04(A) (West 2007) (prosecution must prove knowledge or recklessness with respect to age of a child between the ages of thirteen and sixteen). Under these statutory schemes, the government must prove not only the child's age, but also that the defendant knew or should have known the child's age.

(Haw. 1996); *State v. Stiffler*, 117 Idaho 405, 788 P.2d 220, 222 (Idaho 1990); *State v. Tague*, 310 N.W.2d 209, 212 (Iowa 1981); *Walker v. State*, 363 Md. 253, 768 A.2d 631, 632 (Md. 2001); *Commonwealth v. Montalvo*, 50 Mass. App. Ct. 85, 735 N.E.2d 391, 393-94 (Mass. App. Ct. 2000); *People v. Cash*, 419 Mich. 230, 351 N.W.2d 822, 826 (Mich. 1984); *Collins v. State*, 691 So. 2d 918, 923 (Miss. 1997); *State v. Navarrete*, 221 Neb. 171, 376 N.W.2d 8, 11 (Neb. 1985); *Jenkins v. State*, 110 Nev. 865, 877 P.2d 1063, 1067 (Nev. 1994); *Goodrow v. Perrin*, 119 N.H. 483, 403 A.2d 864, 867-68 (N.H. 1979); *State v. Anthony*, 133 N.C. App. 573, 516 S.E.2d 195, 199 (N.C. Ct. App. 1999); *Reid v. State*, 1955 OK CR 106, 290 P.2d 775, 784 (Okla. Crim. App. 1955); *State v. Yanez*, 716 A.2d 759, 764 (R.I. 1998); *Toomer v. State*, 339 S.C. 434, 529 S.E.2d 719, 721 (S.C. 2000); *State v. Fulks*, 83 S.D. 433, 160 N.W.2d 418, 420 (S.D. 1968), *overruled on other grounds by State v. Ree*, 331 N.W.2d 557, 562 (S.D. 1983); *Johnson v. State*, 967 S.W.2d 848, 849-50 (Tex. Crim. App. 1998); *State v. Searles*, 159 Vt. 525, 621 A.2d 1281, 1283 (Vt. 1993); *Rainey v. Commonwealth*, 169 Va. 892, 193 S.E. 501, 502 (Va. 1937). California is the only state that currently reads a mistake of fact defense into a statute that does not include one. *Hernandez*, 393 P.2d at 673. But the courts have still noted that sex crimes with children are treated as strict liability crimes when the child is below a certain age. *See* Cal. Penal Code §§ 261.5, 288 (West 2007); *People v. Olsen*, 36 Cal. 3d 638, 205 Cal. Rptr. 492, 685 P.2d 52, 57 (Cal. 1984); *see also United States v. Gomez-Mendez*, 486 F.3d 599, 603-04 (9th Cir. 2007).

In another twenty states, while the government need not prove the defendant knew or reasonably should have known the age of the child, a legislatively created mistake of fact defense does exist, is explicitly outlined in a statute, and most often is available only for sexual acts with children above a certain age.[8]

The latter model is mirrored both in a charged violation for carnal knowledge and other sexual offenses under Article 120, UCMJ, and the federal civilian analog, 18 U.S.C. § 2243(d) (2000). Neither requires that the government prove the accused knew the age of the child. But both contain an explicit mistake of fact defense, limited to children above a certain age only. Article 120(o), UCMJ, 2006 NDAA § 552, 119 Stat. at 3258-59; 18 U.S.C. § 2243(d).

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[8] Ariz. Rev. Stat. Ann. § 13-1407 (2007); Ark. Code Ann. § 5-14-102 (2007); Colo. Rev. Stat. Ann. § 18-1-503.5 (West 2007); 720 Ill. Comp. Stat. Ann. 5/12-17 (West 2007); Me. Rev. Stat. Ann. tit. 17-A §§ 253, 254 (2007); Minn. Stat. Ann. § 609.344 (West 2007); Mo. Ann. Stat. § 566.020 (West 2007); Mont. Code Ann. § 45-5-511 (2007); N.M. Stat. Ann. § 30-9-11 (West 2007); N.D. Cent. Code § 12.1-20-01 (2007); Ohio Rev. Code Ann. § 2907.02 (West 2007); Or. Rev. Stat. Ann. § 163.325 (West 2007); 18 Pa. Cons. Stat. Ann. § 3102 (West 2007); Tenn. Code Ann. § 39-11-502 (West 2007); Wash. Rev. Code Ann. § 9A.44.030 (West 2007); W. Va. Code Ann. § 61-8B-12 (West 2007); Wyo. Stat. Ann. § 6-2-308 (2007). Three states make the mistake of fact defense available in all cases involving minors. Alaska Stat. § 11.41.445(b) (2007); Ind. Code Ann. § 35-42-4-3(c) (West 2007); Ky. Rev. Stat. Ann. § 510.030 (West 2007).

The remaining seven states and the District of Columbia have taken the prudential step of explicitly forbidding a mistake of fact defense with regard to sex crimes involving children, thereby foreclosing litigation of the sort raised in the instant case.[9]

In those jurisdictions that have departed from the historical treatment of sexual offenses involving children and permitted a mistake of fact defense with respect to the age of the child, the changes have almost always been made by the appropriate policymakers, not the judiciary.

II.

The parties argue that this Court should assume a mistake of fact defense with respect to the age of the child under Article 125, UCMJ, by reference to Article 120, UCMJ, R.C.M. 916, and the federal statute, 18 U.S.C. § 2243(d). All of the provisions are instructive, but not for the reasons articulated by the parties.

A.

Like the sodomy charge in this case, carnal knowledge under Article 120, UCMJ, and "sexual

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[9] D.C. Code 22-3011 (2007); Fla. Stat. Ann. § 794.021 (West 2007); Kan. Stat. Ann. § 21-3202 (2007); La. Rev. Stat. Ann. § 14:80C (2007); N.J. Stat. Ann. § 2C14-5.c. (West 2007); N.Y. Penal Law § 15.20 (McKinney 2007); Utah Code Ann. § 76-2-304.5 (2007); Wis. Stat. Ann. § 939.43 (West 2007).

acts" under 18 U.S.C. § 2243 criminalize consensual sexual activity based on the age of the child. In 1996, Congress included an explicit mistake of fact defense as to age in Article 120, UCMJ, mirroring a similar defense in 18 U.S.C. § 2243, but did not provide one in Article 125, UCMJ. *MCM,* Analysis of Punitive Articles app. 23 at A23-14. And the same year the President included a mistake of fact defense as to age in R.C.M. 916(j)(2) for Article 120, UCMJ, but did not provide one for Article 125, UCMJ. *MCM,* Analysis of the Rules for Courts-Martial app. 21 at A21-64. There is no reason to assume that this inaction by Congress and the President, who have had numerous opportunities to address the differences between the various provisions, somehow requires this Court read a mistake of fact defense into Article 125, UCMJ.[10]

The parties argue that the similarity of the statutes, Congress's desire to conform military law to federal civilian law, and the fact that the conduct charged under Article 125, UCMJ, in this case would ostensibly fall within 18 U.S.C. § 2243 in the civilian world, require us to read the defense into Article 125, UCMJ, to harmonize the statutory scheme and effectuate legislative intent.[11] These

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[10] To the extent that constitutional challenges may be available based on any differences between the *MCM,* Articles 120 and 125, UCMJ, and 18 U.S.C. § 2243, the parties chose not to challenge the constitutionality of Article 125, UCMJ, in this case.

[11] Of course, the delineated mistake of fact defense in both Article 120, UCMJ, and 18 U.S.C. § 2243, would have been unnecessary had there been a mens rea with respect to age

arguments have no support in the structure of the statutory scheme or legislative or executive intent as expressed in the respective histories of the different statutes and the *MCM*. Moreover, the parties fail to explain why, if Congress wished to conform Article 125, UCMJ, to civilian practice, they did not simply amend the statute to include age or a defense to age, thereby superseding the President's inclusion of age as a factor in the *MCM*, or why the President did not amend R.C.M. 916(j), or *MCM* pt. IV, para. 51., to include a mistake of fact defense as to age.[12]

1.

First, where Congress intended to create a mistake of fact defense with respect to the age of a child in a sexual offense when a defendant's knowledge of that fact was otherwise irrelevant to the offense charged, it did so explicitly. Articles 120 and 125, UCMJ, and 18 U.S.C. § 2243, deal with offenses of a similar nature, and each criminalizes

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either explicit or latent in the statute. *See* R.C.M. 916(j)(1); LeFave, *supra*, at § 5.6(a).

[12] It is suggested that the appropriate policy-making bodies may have been reluctant to amend Article 125, UCMJ, because the policy regarding homosexuals in the military is politically sensitive. *United States v. Wilson*, M.J. (9) (C.A.A.F. 2008) (Effron, C.J., dissenting). Taking that hypothesis as true, and setting aside the fact that this case involves heterosexual sodomy, the combination of the parties' agreement that the rule should be changed for policy reasons, with the assumed fact that it has been difficult for elected officials to effectuate that change, still does not permit this Court to make a public policy determination by judicial fiat.

behavior that could otherwise be lawful, but for some factor such as age. And, as conceded by the parties, none of the three statutes require the government prove that the accused knew the age of the child. Taking all three statutes together, it becomes clear that even though the government need only prove the fact of age, and not that an accused knew or reasonably should have known that fact, Congress nonetheless provided a mistake of fact defense with respect to some ages and some sexual activities in some instances, and not for all ages and all sexual activities in all instances.

The Supreme Court has consistently held that "'[Where] Congress includes particular language in one section of a statute but omits it in another section . . . it is generally presumed that Congress acts intentionally and purposely in the disparate . . . exclusion.'" *Russello v. United States*, 464 U.S. 16, 23, 104 S. Ct. 296, 78 L. Ed. 2d 17 (1983) (citation omitted); *see also Keene Corp. v. United States*, 508 U.S. 200, 208, 113 S. Ct. 2035, 124 L. Ed. 2d 118 (1993) (finding that the use of a phrase in one part of a statutory scheme "only underscores our duty to refrain from reading a phrase into the statute when Congress has left it out" of another section). In light of this rule of construction, we decline to read a mistake of fact defense as to the age of the child into Article 125, UCMJ.

2.

Nor does legislative intent as expressed through legislative action support a mistake of fact defense

here. The parties argue, from the respective histories of Articles 120 and 125, UCMJ, that Congress intended to harmonize the legislative scheme, but overlooked Article 125, UCMJ. After reviewing the history of both statutes, we fail to see support for this position. We must assume Congress understood the background principles, discussed *supra,* regarding mens rea, statutory construction, and the different treatment of mens rea with respect to the fact of age in the context of child sex offenses. Put succinctly, "Congress does not write upon a clean slate." *United States v. Texas,* 507 U.S. 529, 534, 113 S. Ct. 1631, 123 L. Ed. 2d 245 (1993) (citation omitted). In this case, we find no evidence that Congress intended to abrogate the principle reflected in the practice of the majority of jurisdictions that the crime of sodomy with a child does not contain a mens rea with respect to the age of the child or permit a mistake of fact defense absent legislative action. *See Morissette,* 342 U.S. at 251 n.8.

Congress first revisited the statutory scheme pertaining to sexual offenses involving children in the National Defense Authorization Act (NDAA) for Fiscal Year 1996. Congress added an affirmative defense of mistake of fact for an Article 120, UCMJ, offense committed against a person over the age of twelve and under the age of sixteen to "conform military law to federal civilian law," but did not include a defense for sodomy. S. Rep. No. 104-112, § 532, at 243 (1995); H.R. Rep. No. 104-131, § 545, at 218 (1995); *see* 1996 NDAA Pub. L. No. 104-106, §

1113, 110 Stat. 186, 462 (codified as amended at 10 U.S.C. § 925 (1996)).

In 2005, as required by Congress, the Department of Defense General Counsel submitted a report detailing proposed changes regarding sexual offenses under the UCMJ. *See* H.R. Rep. No. 108-767, § 571, at 111 (2004) (Conf. Rep.). This report explicitly requested that the mistake of age defense be removed from possible defenses to carnal knowledge under Article 120, UCMJ. The report also requested that Article 125, UCMJ, be brought in line with federal civilian law by requiring the prosecution to prove that the act of unnatural copulation was done by force. The report did not suggest the inclusion of a mistake of age defense to sodomy. Dept. of Defense, *Proposed Amendments to the Uniform Code of Military Justice with Initial DOD Draft of Complementary Proposed Changes to the Manual for Courts-Martial* (submitted to Congress on April 7, 2005), *available at* http://www.dod.mil/dodgc/php/docs/HASCMeeting42105.pdf.

The House of Representatives did not accept the Department of Defense recommendations. Instead, it maintained the mistake of fact with respect to age defense for carnal knowledge, and passed an amendment to Article 120, UCMJ, that created a series of graded offenses. H.R. Rep. No. 109-89, § 555, at 332 (2005) (amendment accepted in H.R. Rep. No. 109-360, § 552, at 703 (2005) (Conf. Rep.)). Neither house of Congress proposed amendments to

Article 125, UCMJ, despite significant amendments to related provisions.

Most recently, in the 2006 NDAA, Congress completely rewrote Article 120, UCMJ. §552, 119 Stat. at 3257-63. As currently enacted, Article 120, UCMJ, covers not only the offenses of rape and carnal knowledge, but also, *inter alia,* aggravated sexual assault of a child, aggravated sexual abuse of a child, aggravated sexual contact with a child, and indecent liberties with a child. *Id.* Congress retained a mistake of fact provision in the new version of the statute where the criminality of the conduct in question depended on the child being less than sixteen years old, but over the age of twelve. *Id.* at 3258-59. Despite this major revision to a statute applicable to many sexual offenses involving minors, sodomy was not included within it, and again, no changes were made to Article 125, UCMJ. We decline to redraft Article 125, UCMJ, to include a defense that Congress might have added, but did not.

3.

Nor is executive action to the contrary. The *Manual for Courts-Martial* has undergone four major amendments since R.C.M. 916(j)(2) added a mistake of age defense for the offense of carnal knowledge in 1996. *MCM* (1998 ed.); *MCM* (2000 ed.); *MCM* (2002 ed.); *MCM* (2005 ed.). And in 2007, R.C.M. 916(j)(2) itself was amended to comport with the new version of Article 120, UCMJ. Exec. Order

No.. 13,447, 72 Fed. Reg. 56,179. Again, no corresponding provision was included for sodomy.

While legislative or executive inaction is not dispositive, the fact that neither Congress nor the President have acted with respect to Article 125, UCMJ, or the *MCM,* while specifically adding, and then maintaining, a mistake of fact defense with respect to the age of the child for Article 120, UCMJ, cuts against the suggestion that either Congress or the President intended to harmonize the legislative scheme.

B.

Finally, we note that Article 120, UCMJ, and R.C.M. 916(j)(2), provide a mistake of fact defense only for those acts committed against a child who has "attained the age of twelve years." Almost every legislature that has adopted a mistake of fact defense, has taken a similar tack, making the defense available only for children over a certain age. *See supra* note 8. There are obvious public policy reasons for, and sound judgments behind, this approach. But whether, and at what point, the line should be drawn for a mistake of fact defense with respect to age for the crime of sodomy with a child are public policy decisions, not decisions for this Court.

III.

Our conclusion that there is no mistake of fact defense as to the child's age for this Article 125,

UCMJ, offense is dispositive as to the originally granted issue. "This Court rejects a guilty plea only where the record shows a substantial basis in law and fact for questioning a plea. We review a military judge's decision to accept a guilty plea for an abuse of discretion." *United States v. Harrow*, 65 M.J. 190, 205 (C.A.A.F. 2007) (citations omitted). As Appellant's guilty plea is rooted in the military judge's correct statement and application of the law, Appellant's guilty plea is provident.

Conclusion

The decision of the United States Army Court of Criminal Appeals is affirmed.

EFFRON, Chief Judge (dissenting):

The majority concludes that an honest and reasonable mistake as to the age of a sexual partner is not a defense to the charge of sodomy with a person under the age of sixteen years. I respectfully disagree. The availability of the defense of mistake of fact as to age for such a sodomy charge is consistent with the *Manual for Courts-Martial* and our Court's case law.

The present appeal involves the providence inquiry for a guilty plea. The conclusion of the majority also would apply in contested cases, as illustrated by the following example. Two young soldiers attend a party and meet members of the opposite sex who identify themselves as college students. In the course of events, each couple develops a relationship that includes consensual sexual contact. Eventually, various details come to the attention of the command, including facts indicating that the relationships involve persons under the age of sixteen.

Based on the nature of the sexual contact, one soldier is charged with indecent acts with a child under the age of sixteen, while the second soldier is charged with sodomy with a child under the age of sixteen. *Manual for Courts-Martial, United States* pt. IV, paras. 51.f., 87.f. (2005 ed.) (*MCM*). At each trial, the soldier testifies that he did not know that the other person was under the age of sixteen, describing the circumstances of the initial meeting and other pertinent facts. In the trial of the soldier

charged with indecent acts with a person under sixteen years, the military judge instructs the court-martial that mistake of fact as to age is a defense, and the members return a finding of not guilty on that charge. In the trial of the soldier charged with sodomy with a child, the military judge declines to give the instruction and the members return a finding of guilty.

If the disparity in treatment of these offenses had been prescribed expressly by Congress or the President, that would settle the issue. The disparity, however, is not required by either the statutory or regulatory text that describes the pertinent offenses. Neither statute addresses the subject of age, either as an element of the offense or as a defense. *See* Articles 125 and 134, Uniform Code of Military Justice (UCMJ), 10 U.S.C. §§ 925, 934 (2000). The Manual provisions describing the elements of each offense set forth the proscribed contact with a person under the age of sixteen, but neither contains a limitation on the defense of mistake of fact as to age. *See MCM* pt. IV, paras. 51.b., 87.b.

The disparity would result not from the express treatment of these offenses by Congress or the President, but from judicial interpretations of the general mistake of fact defense set forth by the President in Rule for Courts-Martial (R.C.M.) 916(j)(1). As a matter of judicial interpretation, the mistake of fact defense in R.C.M. 916(j)(1) is available as to age when the accused has been charged under Article 134, UCMJ, with indecent acts with a person under the age of sixteen. *See*

United States v. Zachary, 63 M.J. 438, 444 (C.A.A.F. 2006). Under the majority opinion, however, the same defense would not be available with respect to the charge of sodomy with a person under the age of sixteen.

I. THE MISTAKE OF FACT DEFENSE

R.C.M. 916(j)(1) describes the circumstances in which a person may defend against a charged offense on the basis of a mistake of fact:

> Except as otherwise provided in this subsection, it is a defense to an offense that the accused held, as a result of ignorance or mistake, an incorrect belief of the true circumstances such that, if the circumstances were as the accused believed them, the accused would not be guilty of the offense. If the ignorance or mistake goes to an element requiring premeditation, specific intent, willfulness, or knowledge of a particular fact, the ignorance or mistake need only to have existed in the mind of the accused. If the ignorance or mistake goes to any other element requiring only general intent or knowledge, the ignorance or mistake must have existed in the mind of the accused and must have been reasonable under all the circumstances. However, if the accused's knowledge or intent is immaterial as to an element, then ignorance or mistake is not a defense.

Under the rule, the military judge must decide whether the claimed mistake goes to an element of the offense requiring knowledge or intent. If so, the defense applies. If the accused's intent or knowledge is immaterial, then the defense does not apply.

In general, neither Congress nor the President has restricted or otherwise regulated the application of the mistake of fact doctrine with respect to specific offenses. Congress has addressed mistake of fact with respect to carnal knowledge, providing a statutory mistake of fact defense as to age. *See* Article 120(d), UCMJ, 10 U.S.C. § 920(d) (2000). Congress recently added a number of other sexual offenses to Article 120, UCMJ, and provided a statutory mistake of fact defense as to age for certain offenses, including aggravated sexual assault, aggravated sexual abuse, abusive sexual contact, and indecent liberty. Article 120(o)(2). These amendments became effective with respect to offenses occurring on or after October 1, 2007. Exec. Order 13,447, 72 Fed. Reg. 56,179 (Oct. 2, 2007). There is no similar statutory provision with respect to sodomy. *See* Article 125, UCMJ.

Prior to the enactment of Article 120(d), UCMJ, in 1996, the President expressly addressed the mistake of fact defense with respect to carnal knowledge. *See, e.g.*, *MCM* pt. IV, para. 45.c.(2) (1984 ed.). The President, however, did not prescribe any guidance with respect to the application of the mistake of fact defense to the offense of sodomy. *Id.* at para. 51.

In the current *Manual,* the President has provided specific guidance as to the mistake defense with respect to a number of offenses. *See, e.g.,* R.C.M. 916(j)(2); R.C.M. 920(e)(3) (instructions on mistake of fact in carnal knowledge cases); *MCM* pt. IV, para. 45.c.(2) (regulating defense of mistake of fact as to age in carnal knowledge cases); *id.* at para. 19.c.(1)(d) (regulating mistake defense in resisting apprehension cases); *id.* at para. 25.c.(4) (regulating mistake defense in countersign cases); *id.* at para. 43.c.(2)(b) (regulating mistake defense as to transferred premeditation in murder cases); *id.* at para. 49.c.(18) (regulating mistake defense in check cases involving insufficient funds); *id.* at para. 62.c.(4) (regulating mistake of fact defense in adultery cases). With respect to the new statutory offenses under Article 120, paragraph 45.a.(o)(2) of the Manual sets forth the mistake of fact defenses provided in the statute. Exec. Order 13,447, 72 Fed. Reg. 56,192. The present Manual, however, does not provide specific guidance on the defense with respect to sodomy. *See MCM* pt. IV, para. 51.

In short, the offense of sodomy is like any other offense under the UCMJ in which the mistake of fact defense has not been regulated by Congress or the President. A military judge must decide at trial whether the defense is applicable, and an appellate court must decide whether the military judge ruled correctly on the issue.

II. AVAILABILITY OF THE MISTAKE OF FACT DEFENSE AS TO AGE FOR THE OFFENSE OF SODOMY

A.

To the extent that our Court has addressed the mistake of fact defense as to age with respect to sodomy, we have done so in dicta in cases in which the granted issue did not involve the offense of sodomy. *See, e.g., United States v. Strode,* 43 M.J. 29, 31 (C.A.A.F. 1995) (suggesting that the mistake of fact defense as to age is not available in sodomy cases); *Zachary,* 63 M.J. at 442 (suggesting that the mistake of fact defense as to age is available in sodomy cases).

Although *Zachary* involved a different statute, it serves as the most recent precedent regarding the application of the mistake of fact defense in R.C.M. 916(j)(1) to an offense involving a charge of sexual contact with a child when age is not an element set forth in the statute, but in the Manual. The accused in *Zachary* was charged with indecent acts with a person under the age of sixteen in violation of Article 134, UCMJ -- the general article -- a statute that does not expressly address indecent acts, much less age. As noted in *Zachary,* the applicable Manual provision sets forth several elements describing the proscribed conduct and includes an element requiring proof that the subject of the act was under the age of sixteen. 63 M.J. at 441-42. We concluded that age was an element to which the mistake of fact defense would apply, and we expressly rejected the contention that it was merely an aggravating factor as to punishment. *Id.* at 443-44.

In the absence of any express restrictions or guidance from Congress or the President regarding the availability of the mistake of fact defense for sodomy, the responsibility for determining whether the defense is available under R.C.M. 916(j)(1) rests with the judiciary. Our decision in *Zachary* offers persuasive guidance because the offense at issue in *Zachary* -- indecent acts with a person under sixteen years -- is similar in structure to the offense at issue in the present appeal. *Compare MCM* pt. IV, para. 87, *with id.* at para. 51. As in *Zachary,* age is an element of the offense of sodomy with a child, not merely an aggravating factor as to punishment. *Zachary* provides an appropriate judicial standard for determining that an honest and reasonable mistake as to age provides a defense to a charge of sodomy with a person under the age of sixteen years. We should adhere to that standard in the present case. In that regard, I agree with Judge Baker's statutory and regulatory analysis of Article 125, UCMJ, and *MCM* pt. IV, para. 51.b.

B.

The legislative history of the 1996, 2005, and 2006 amendments to Article 120, UCMJ (rape and carnal knowledge), as set forth in the majority opinion, does not require us to abandon the *Zachary* standard. The text of the article, both before and after those amendments, expressly sets forth a specific age of the sexual partner -- under sixteen years -- as the basis for criminal liability. By contrast, the text of Article 125, UCMJ (sodomy),

has never set forth the age of the sexual partner as a legislative basis for criminal liability.

The legislative history of the 1996 amendments, as set forth in the majority opinion, makes no mention of Article 125 or sodomy. The sole focus of the 1996 amendments was to conform Article 120, dealing with rape and carnal knowledge, to the treatment of age in similar federal civilian laws. *See* S. Rep. No. 104-112, § 532, at 243 (1995). We cannot infer that Congress had any focus on sodomy when it developed and passed legislation amending the separate offense of carnal knowledge under Article 120.

With respect to the legislative history of the amendments to Article 120 in 2005 and 2006, the majority opinion does not identify any authoritative statement that would explain why Congress did not address the subject of sodomy in the legislation that amended other sexual offenses. We are not simply confronted with congressional inaction, we are dealing with congressional silence on the reasons for inaction.

Congress has not enacted legislation to make age an element of the offense of sodomy, nor has it made mistake of fact as to age a statutory defense. When we are dealing with an article of the code in which age is not an element of the offense, such as Article 125, we should exercise great caution in drawing substantive inferences from congressional inaction. The problem with such speculation, particularly in the absence of legislative history setting forth a

reason for the inaction, is that there are many reasons why Congress may not act on a particular aspect of a legislative proposal. If one were to speculate with respect to Article 125, UCMJ, for example, such speculation could include the possibility that congressional inaction resulted from concern that amending the sodomy statute would run the risk of reopening the highly contentious debate that occurred in 1993 regarding sexual orientation in the military. *See* H.R. Rep. No. 103-200, at 287-90 (1993). In the circumstances of the present case, however, we need not rely on speculation about this or any other reason for legislative inaction. The majority opinion does not establish that the legislative record provides a sufficient foundation to permit reliance on congressional inaction as a basis for deciding the case before us.

C.

In the course of its statutory analysis, the majority opinion takes the position that "[w]hile the conduct charged under Article 125, UCMJ, in this case remains criminal, an act of sodomy in private between consenting adults may not be, absent some other fact." *United States v. Wilson*, M.J. (6) (C.A.A.F. 2008) (citing *Lawrence v. Texas*, 539 U.S. 558, 578, 123 S. Ct. 2472, 156 L. Ed. 2d 508 (2003)). In that context, the majority opinion offers an interpretation of Article 125, a pre-*Lawrence* statute, based upon the assumed outcome of future litigation regarding the constitutionality of the statute as applied to certain private sexual contact

between consenting adults. That is a question that we expressly declined to answer in *United States v. Marcum*, 60 M.J. 198, 206-08 (C.A.A.F. 2004).

The question before us involves the meaning of Article 125, a statute unchanged since Congress enacted the UCMJ in 1950. Congress may decide in the future to decriminalize consensual private adult sodomy, or this Court may decide to hold the statute unconstitutional as applied in certain circumstances. The issue before us, however, is not the future scope of Article 125. The issue before us is the present availability of a mistake of fact defense under a statute, enacted more than fifty-five years ago which, on its face, does not rely on age to distinguish between criminal and non-criminal conduct.

In the present case, the Government and Appellant both agree that the defense of mistake of fact as to age was available. Neither party has urged us to revisit *Marcum*, 60 M.J. 198, or otherwise reinterpret Article 125 or R.C.M. 916(j)(1). In view of the availability of the defense under R.C.M. 916(j)(1), as underscored by our treatment of a similar offense in *Zachary*, 63 M.J. 438, we need not enter either the constitutional thicket or the uncertainties of interpreting congressional silence.

BAKER, Judge (dissenting):

I agree with the majority's recognition of the traditional rule that "[o]ffenses that require no mens rea generally are disfavored . . . some indication of congressional intent, express or implied, is required to dispense with mens rea as an element of a crime." *Staples v. United States,* 511 U.S. 600, 606, 114 S. Ct. 1793, 128 L. Ed. 2d 608 (1994) (citation omitted). I also agree with the majority's observation of the President's exercise of the authority delegated under Article 36, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 836 (2000), regarding Article 125, UCMJ, 10 U.S.C. § 925 (2000), in that "[t]he President's addition of the fact of the age of the child also does not contain an explicit mens rea."

However, I respectfully dissent from the majority's application of these principles to the circumstances of this case. In my view, the majority focuses its attention on the wrong questions. The question presented is whether the President, utilizing his authority under Article 36, UCMJ, has made age an element of the offense of sodomy with a child under sixteen, and if so, whether that element includes a mens rea requirement. What this case is not about is: (1) whether Congress has created a mistake of fact defense -- it has not; (2) whether this Court can create a mistake of fact defense -- it may not; or (3) the nature of the prevailing states legislative practices toward strict liability. Moreover, the parties' focus on *United States v. Zachary,* 63 M.J. 438 (C.A.A.F. 2006), does not

address the President's language as provided in the *Manual for Courts Martial, United States* pt. IV, para. 51.b. (2005 ed.) (*MCM*).

There are two interpretive problems presented. First, the President, who is an appropriate policymaker to make such choices, has listed age as an element of the crime of sodomy and not merely as a sentence ennancer. *Id.* The elements of sodomy set forth in the *MCM* are:

> b. *Elements.*
>
> (1) That the accused engaged in unnatural carnal copulation with a certain other person . . . .
>
> *Id.* And as applicable:
>
> (2) That the act was done with a child under the age of 12[; or]
>
> (3) That the act was done with a child who had attained the age of 12 but was under the age of 16[; or]
>
> (4) That the act was done by force and without the consent of the other person.

Id. Moreover, whether the paragraph subheading is dispositive or not, age is tantamount to an element. "[T]he relevant inquiry is one not of form, but of effect -- does the finding expose the defendant to greater punishment than that authorized."

Apprendi v. New Jersey, 530 U.S. 466, 494, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000). Indeed, the military judge advised the accused that age was an element of the offense. Thus, this is not a situation where the law is silent. Rather, the *MCM* expressly includes age as an element. Therefore, the general rule in civilian practice is not applicable in military practice where the President has in fact "legislated" a further gloss onto the statutory language.

Here the second problem arises. Although it appears certain that the drafters of the *MCM* provisions have listed age as an element of the offense of sodomy, it is equally uncertain what degree of mens rea this element was intended to bear. This ambiguity is reflected in the Government's own concession that the defense of mistake of fact applies. It is also reflected in the manner in which "the act" is set out in the elements.

On the one hand, one can read the elements of the offense so that the act in question is alone contained in the first element -- "that the accused engaged in unnatural carnal copulation." In this case, the other three elements are, in effect, aggravating factual circumstances. Indeed, this may represent the better view.

On the other hand, the second and third (as applicable) elements can be read to state that "the act" is "unnatural carnal copulation with a child under the age of [twelve or sixteen]." And, it would appear that the military practice is to charge the offense of "sodomy with a child under [twelve or

sixteen]" and not merely "sodomy," with an aggravating factor. Indeed, while disavowing the dicta in *Zachary*, the government has argued in other cases that the mistake of fact defense applies to sodomy with a child under sixteen.

This ambiguity is important, because the question of intent only applies to acts and not to facts, and if the only act in question were "sodomy," as opposed to "sodomy with a child under 16," then additional elements (2) and (3) pertaining to age would require no mens rea and therefore, no opportunity for a mistake of fact defense would exist.

This ambiguity is important as well given the majority's suggestion that this Court is not an appropriate policy-making body to address the question presented. We are not a policy-making entity. But in light of the ambiguity in the *MCM's* drafting, this Court should be interpreting the language using the tools of statutory construction. This is what judges do where the law is unclear or subject to more than one possible reading.

Applying the same principles of statutory construction identified by the majority, I would conclude that both readings of the *MCM* are available -- one treating "sodomy with a child under sixteen" as a general intent crime and one treating the act of "sodomy" alone as a general intent crime, with age as an additional factual element not requiring intent. In the former case, the mistake of fact defense would be available where the mistake

was honest and reasonable. Rule for Courts-Martial (R.C.M.) 916(j)(1).

An intent to extinguish mens rea "must be clearly indicated in the statutory language or in the President's implementation of the UCMJ through the *MCM*. Otherwise, an accused would not be placed on fair notice of the threshold for criminal conduct." *United States v. Thomas*, 65 M.J. 132, 138 (C.A.A.F. 2007) (Baker, J., dissenting). As a result, this seems to be the sort of case where any ambiguity should in fact inure to the benefit of the accused. *Cleveland v. United States*, 531 U.S. 12, 25, 121 S. Ct. 365, 148 L. Ed. 2d 221 (2000) ("'[A]mbiguity concerning the ambit of criminal statutes should be resolved in favor of lenity'") (citation omitted); *Hughey v. United States*, 495 U.S. 411, 422, 110 S. Ct. 1979, 109 L. Ed. 2d 408 (1990) ("[L]ongstanding principles of lenity . . . demand resolution of ambiguities in criminal statutes in favor of the defendant"). This seems especially appropriate where the ambiguity is easily addressed through executive clarification and amendment.

APPENDIX B

UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before
SCHENCK, ZOLPER, and WALBURN
Appellate Military Judges

UNITED STATES, Appellee

v.

Private E2 ALEXANDER N. WILSON
United States Army, Appellant

ARMY 20040227

Headquarters, Fort Hood
Debra L. Boudreau, Military Judge
Colonel Harold E. Brown, Jr., Staff Judge Advocate

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15 May 2006

DECISION

Per Curiam:

On consideration of the entire record, including consideration of the issues personally specified by

the appellant, we hold the findings of guilty and the sentence as approved by the convening authority correct in law and fact. Accordingly, those findings of guilty and the sentence are AFFIRMED.

FOR THE COURT:
s/ Malcolm H. Squires Jr.
MALCOLM H. SQUIRES, JR.
Clerk of Court

UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before
SCHENCK, ZOLPER, and WALBURN
Appellate Military Judges

UNITED STATES, Appellee

v.

Private E2 ALEXANDER N. WILSON
United States Army, Appellant

ARMY 20040227

NOTICE OF COURT-MARTIAL ORDER CORRECTION

IT IS ORDERED THAT, to reflect the true proceedings at the trial of the above-captioned case,

SPECIAL COURT-MARTIAL ORDER NUMBER 16, HEADQUARTERS, FORT HOOD, FORT HOOD, TEXAS 76544-5001, dated 15 July 2004,

IS CORRECTED AS FOLLOWS:

BY deleting in line two of the Specification of Charge IV the date "20 October 2003" and substituting therefor the date "13 October 2003."

DATE: 15 May 2006

FOR THE COURT:
s/ Malcolm H. Squires, Jr.
MALCOLM H. SQUIRES, JR.
Clerk of Court